No. 91-565

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

James T. Adams
4534 W. Outer Drive
Detroit, MI 48235
(313) 864-1790

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QUESTIONS PRESENTED

I. Did the City of Detroit, Michigan Fire Department deny practitioner his constitutional due process and equal protection rights by suspending and then discharging him without adequate notice of pre-suspension or pre-discharge hearing as required under Loudermill?

II. Did the trial court err in finding no Loudermill violation, where petitioner was suspended without any meaningful notice, opportunity to defend or hearing?

III. What type of pre-discharge hearing is required under Loudermill?

IV. At what point does a delay in the post-determination hearing become a constitutional violation?

V. Does a constitutional due process deprivation entitle the Petitioner to reinstatement, equal job opportunity, compensation of full back pay and pay increases with interest, benefits (including social security, allowances, health care insurance-Medical and Dental, sick and vacation time, unemployment, seniority COLA payment, retirement and pension), attorney fees and costs?

PARTIES

The Plaintiff-Appellant in the proceedings in the Court of Appeals was James T. Adams. The Defendants-Appellees in the Court of Appeals were the City of Detroit (Coleman A. Young, Mayor) and the Detroit Fire Department (Melvin Jefferson, Fire Commissioner and Phillip F. Gorak, Deputy Fire Commissioner).

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No. _____

Supreme Court of the United States

_____

October Term 1991

_____

James T. Adams

Petitioner,

vs.

City of Detroit, Michigan

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Michigan Court of Appeals

James T. Adams petitions this court to issue a writ of certiorari to the Michigan Court of Appeals to review the judgement entered by that court against him.

OPINIONS BELOW

On April 15, 1988, Judge Susan D. Borman, Wayne County Circuit Court, entered an order granting Defendant's motion for

Summary Disposition in an Mandamus Action (Appendix A).

On January 30, 1989, Judge Susan D. Borman, Wayne County Circuit Court entered an order denying Writ of Superintending Control (Appendix B).

On April 10, 1990, Judges Robert J. Danhof, Thomas J. Brennan and Glenn S. Allen Jr., State of Michigan Court of Appeals, issued an opinion affirming the above two actions (Appendix C).

On February 25, 1991, the Michigan Supreme Court denied the application for leave to appeal (Appendix D).

JURISDICTION

The judgement of the State of Michigan Court of Appeals was entered on April 10, 1990. A timely petition for petition for leave to appeal to the Michigan Supreme Court was denied February 25, 1991. The present petition was filed with this court within ninety days of that date.

The jurisdiction of the Supreme Court is invoked pursuant to Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution states as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Michigan Veterans Preference for Public Employment 35.402 states, in pertinent part, as follows:

> Removal, suspension or transfer from public employment, hearing, protest, waiver reinstatement.

28 U.S.C. § 1257 State courts; certiorari

(a) Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

42 U.S.C. § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia.

STATEMENT OF THE CASE

Petitioner, James T. Adams, an honorably discharged veteran, has been employed by the City of Detroit since June, 1974 as Coordinator of Civil Defense with the Detroit Fire Department. The petitioner had a classified civil service employee status in addition to being a veteran with those rights accorded to him as a veteran under the Veterans Preference Act, M.C.L. 35.402.

Petitioner's suspension and ultimate discharge by the City of Detroit, which is the subject of this appeal, evolved from an incident involving petitioner and a fellow employee, Ms. Delores Stewart, which occurred on or about January 22, 1982. As a result of that incident, Ms. Stewart filed a complaint or grievance with the Fire Commissioner.

The Deputy Commissioner, Mr. Philip Gorak, apparently in response to this

complaint, scheduled a special meeting in his office with petitioner, Mr. Dan Bojalad (Stewart's supervisor), the Administrative Assistant Quinton Watkins, and himself, on February 10, 1982. Delores Stewart, complainant, was not in attendance.

Mr. Gorak provided no advance notice to petitioner that the purpose of this meeting was tc determine whether petitioner would be suspended or otherwise reprimanded. Indeed, petitioner had absolutely no knowledge that he was attending a disciplinary hearing. Rather, the clear connotation at the time the meeting was scheduled was that there were personnel problems between Ms. Stewart and petitioner which needed to be resolved.

For this reasons, petitioner did not respond in the manner he would have, had he known it was a disciplinary proceeding as opposed to an informal problem solving meeting.

Only at the conclusion of the meeting

and discussion did Mr. Gorak advise petitioner for the first time that "regardless of any agreement between you two (petitioner and Bojalad), I'm going to suspend you."

Reacting to what he perceived to be a totally improper and illegal suspension, violating both his procedural due process rights and his rights under the Veterans Preference Act, petitioner refused to accept the suspension. Based on that refusal, on February 19, 1982 he was served a notice of discharge by the City of Detroit Fire Department.

Subsequent to his discharge, on March 4, 1982, petitioner sent a protest and demand letter to Mayor Young for a hearing within 30 days in accordance with the Veterans Preference Act (M.C.L.A. 35.402). On April 2, 1982, petitioner filed a Civil Service Grievance Letter with the Civil Service Department, requested a full Civil

Service Hearing, and requested information regarding the Veterans Preference Act application. The Civil Service Department responded on April 15, 1982 and referred the Veterans Preference Act inquiry to the City of Detroit Law Department.

Procedurally, petitioner in this case followed the steps employed by Valentine v. Redford Township Supervisor, 371 Mich. 138 (1963). As an honorably discharged veteran and a civil service employee, he availed himself of both procedures, having the Civil Service Hearing first, but also making the Veterans Preference Act demand. Unlike the situation in Valentine, however, the City of Detroit had no excuse to delay or deprive the petitioner of his Veterans Preference Act rights. The repeal issue had been decisively determined in Valentine twenty (20) years before.

It is the responsibility of the veteran to file a written protest to the proper

official requesting a Veterans Preference Act hearing within thirty (30) days. It is the responsibility of the City of Detroit to schedule the hearing.

On June 24, 1982 a Civil Service Hearing was scheduled by the City of Detroit, and held on the grievance in connection with the petitioner's discharge. The Civil Service Arbitrator's decision against the petitioner was rendered on August 6, 1982.

Petitioner never waived his right to have a Veterans Preference Hearing and never waived the statutory thirty (30) day time period in which the Veterans Preference Hearing is to be held. Not until August 25, 1983, some eighteen (18) months later, was petitioner's Veterans Preference Hearing begun. The hearing was continued from August 25, 1983 to September 13, 1983, at which time it was concluded. The transcripts of the Civil Service Hearing

were incorporated by reference for use by the hearing officer for purposes of the Veterans Preference Hearing.

Petitioner's attorney in his preparatory remarks at the beginning of the petitioner's Veterans Preference Hearing stated:

> "I want to make it very clear that we, meaning by that the veteran decided, that we would go to the Civil Service Hearing route first. We did not do that with a mind toward relieving the executive authority, in this case the mayor, of his obligation to give us a Veterans Preference Hearing within the thirty (30) days of the protest having been filed by Mr. Adams." (Petitioner Veterans Preference Hearing Transcript, p. 4).

When asked by the Veterans Preference Hearing officer of documentation to support the City of Detroit claim for waiver, the City of Detroit attorney, Mr. Mast, was unable to direct the hearing officer to any such documentation.

The Veterans Preference Act states that:

> No veteran . . . holding employment in any public department . . . of the state or any county, city . . . shall be removed or suspended . . . except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony or incompetency . . .

The petitioner's notice of suspension stated as the reason, "Bringing disgrace and discredit to the department." A basis not provided for under the Veterans Preference Act. Moreover, in an analogous case under the Civil Service Act, the City of Hamtramck v. Pitlock, 44 Mich. App.410; 205 N.W.2d 293 (1973) this court concluded that an administrative rule imposed cause of "conduct unbecoming of an officer or employee of the city":

> "Presents a standard or guide so impalpable as to be no standard at all. It subverts the clear policy of the charter because it does not provide meaningful guidance concerning the required mode of conduct. It does not serve the rule making function. Rather, it serves only to lodge unbridged ad hoc ad hominem discretion in the

> Civil Service Commission." Id. at 413-414

The court in Pitlock, supra, thus held that Pitlock was illegally discharged and entitled to immediate reinstatement. See also Sponick v. Detroit Police Department, 44 Mich. App. 162 (1973). Similarly, the grounds given to the petitioner for his suspension were so vague as to be meaningless, making the suspension illegal. The petitioner contends that protestation of an illegal suspension is not insubordination. The Deputy Fire Commissioner's letter accompanying the notice of discharge spells out the incorrect assumption:

> "As of 10:00 am this date, you have still refused to comply with a lawful and direct order from your immediate supervisor. This is act of gross and willful insubordination . . . "

The Deputy Fire Commissioner, the Hearing Officer, the Mayor, indeed the Trial Court, have all assumed it was a lawful order.

But, if the suspension was illegal under Pitlock, supra, the Deputy Fire Commissioner's order could not have been a "lawful order" and thus, was not insubordination as defined by the City of Detroit (See City's Brief in support of Cross Motion for Summary Disposition).

Moreover, insubordination is not an express ground for discharge under the Veterans Preference Act. It is noteworthy that, under Section 12 of the Civil Service Act, M.C.L. 51.362; M.S.A. 5.119 (113), insubordination is an expressly separate and distinct ground for discharge:

> Any person may be removed or discharged, suspended without pay or deprived of vacation privileges . . . by the appointing officer for incompetency, inefficiency, dishonest, drunkenness, immoral conduct, insubordination, discourteous treatment to the public, neglect of duty . . . or any other failure of good behavior, or any acts of misfeasance, malfeasance or nonfeasance in office. (Emphasis Added).

The Civil Service Act (CSA) contains

numerous specific grounds not set forth in the Veterans Preference Act. It is a clear legal error to attempt to stretch the Veterans Preference Act to encompass all the grounds for discharge set forth in the CSA. Had the legislature chose to establish comparable grounds for discharge in the Veterans Preference Act, it had ample opportunity and would have done so by amendment. The Michigan Courts cannot and should not amend the Veterans Preference Act by judicial construction where the legislature refuses to do so.

The petitioner's discharge notice stated that the cause of the discharge was "insubordination". The petitioner, at the Civil Service Hearing, was charged with and found guilty of insubordination. The hearing officer ruled that the petitioner acted wilfully. The Petitioner at the Veterans Preference Act Hearing was charged with "official misconduct". The hearing

officer's report to the mayor, and the mayor's letter to the petitioner, upholding the suspension and discharge by the Deputy Fire Commissioner, failed to specify the exact grounds under the Veterans Preference Act, as to why the petitioner was discharged. However, the Michigan Court of Appeals contributed to the confusion by ruling that the Veterans Preference Act does not require that the hearing officer's report specify in statutory terms which of the enumerated Veteran Preference Act cause or causes served as the actual basis for discharge. Adams v. City of Detroit, (Unpublished Per Curiam Opinion Ct. App. 110121 Consolidated).

The Veterans Preference Act states:

> "The findings shall be transmitted to the Mayor in writing by the legal department whereupon the Mayor shall examine the transcript of the hearing and make a decision based on the transcript thereof."

In other words, by virtue of the equal

protection clause hereinbefore mentioned, the mayor must find the veteran guilty of a specified named Veteran Preference cause or causes before he can exercise the power conferred upon him by the Veterans Preference Act. Lilienthal v. City of Wyandotte, 286 Mich. 604 at pp. 615-616.

The City of Detroit exemplifies bad faith, in advancing the proposition official misconduct, habitual serious or wilful neglect in the performance of duty, insubordination, are mere "magic words" can be found in its own personnel practices and opinion of the Michigan Supreme Court in Cremer v. Alger County Road Commissioner's, 325 Mich. at p. 33, wherein the court held:

> "As noted above, for a period of more than eleven (11) years, plaintiff was permanently employed as one of defendant's maintenance foreman. His status as such was fixed, and except for the reasons specified in the statute, the defendant was without authority to remove him. To hold otherwise would lead to an absurd result."

The petitioner was in the year 1982 discharged for "insubordination". His employment for a period of more than seven (7) years as Coordinator of Civil Defense Operations. His status as such was fixed, and except for the reasons specified in the statute, the City of Detroit was without authority to remove him.

The complainant (Delores Stewart) was not in attendance at the meeting on February 10, 1982. Therefore, the petitioner could not be charged with or found guilty of anything because this conflicts with the petitioner's rights (Sixth Amendment) to be able to confront or cross-examine her regarding the accusations.

The Deputy Fire Commissioner is not the mayor. The Deputy issued the suspension and discharge to the petitioner. He stated that the complaint of Delores Stewart was the only issue which was considered for the suspension. Executive order #5 from the

mayor's office to all department heads states "in the future it will be necessary for you to send immediate written notice to the Mayor, the Civil Service Commission and to the Corporate Counsel, in case of the removal from employment of any veteran employed by your particular department, and to include with this notice, a statement of the reasons for such removal. When practical, this notice should precede the taking of effect of such removal".

Section VII, Page 18-C of the Manual of Standard Personnel Practices, which are subject to court order states that "under the State of Michigan's Veterans Preference Act, veterans have the right to appeal suspensions or discharges directly to the mayor by requesting a hearing within thirty (30) days of the date the suspension or discharge is issued. Such hearings are usually delegated to designated hearing officers of the law department who prepare

reports and make recommendations to the mayor". Under the Veterans Preference Act, veterans may be suspended or discharged only for official misconduct, habitual, serious, or wilful neglect in the performance of duty, extortion, conviction of intoxication, conviction of a felony or incompetency. Care should be taken by the employing department to word the discharge or suspension of a veteran in this manner to aid in winning an appeal under the Veterans Preference Act".

It is obvious that the City of Detroit had knowledge of the rights and preference of a veteran. Only the mayor can suspend or discharge a veteran after notice has been issued and a hearing has been held. The Deputy Fire Commissioner's actions are a violation of the 14th Amendment. Therefore, the suspension and discharge is not valid.

The Veterans Preference Act has been amended twelve (12) times since its original

enactment in 1897. Surely, had the legislature, in its wisdom, wished to allow suspension or removal for generic "just cause" it could have and would have appropriately included this language in one of these amendments. It did not do so. As held in Sullivan v. Gray, supra:

> "Specific words in a given statute will be assigned their ordinary meaning unless a different interpretation is indicated." Oshtemo Twp. v. Kalamazoo, 77 Mich. App. 33, 39; 257 N.E.2d 260 (1971). M.C.L. 8.3A; M.S.A. 2.212 (1).

The grounds listed in the statute are not "generic", but are each a separate and distinct reason justifying suspension or removal. "Official misconduct" is not analogous to insubordination or serious or wilful neglect in the performance of duty. "Extortion" is not the same as "incompetence". The Michigan Court has recognized that these are not mere "magic words", but are express and distinct grounds for action. In Krajewski v. City of Royal

Oak, 126 Mich. App. 695, 337 N.W.2d 635 (1983), Krajewski was discharged by the city for "official misconduct" (even though he was caught redhanded cheating on an advancement exam), because he was neither an official nor acting at that time in an official capacity.

The City of Royal Oak, Michigan argued for an expansive interpretation of the term "official misconduct", to provide the generic "just cause" basis sought by the City of Detroit. The Court of Appeals rejected that position:

> Defendant claims that the statute expressly states that employees may be discharged for "official misconduct" and that, therefore, we ought to construe "official misconduct" so that employees may be guilty of it. However, what the statute actually states is that officers and employees may be discharged for a number of reasons, including "official misconduct". We cannot see why with every reason for discharge stated in the statute must necessarily be applicable to both officers and employees. Defendant has not pointed to any rule of statutory construction

> requiring such a result and we are unable to find any. Id. at 696 (Emphasis Added).

Most importantly, the court noted that only the ground of official misconduct was before it:

> We note that employees subject to the Veterans Preference Act who commit misconduct relating to the duties of their employment may be discharged for serious or willful neglect in the performance of duty; however, no such neglect was charged or found here. Id. at 200.

The City of Detroit facetiously argues that because the Fire Department gave the petitioner a "laundry list" of causes for his suspension an discharge, he was in a much better position than had the Veterans Preference Act ground (or grounds) been provided. The "causes" raised by the Fire Department were like the sands of the desert - constantly changing and shifting to suit the moods and purposes of the City of Detroit, Michigan. Not until April 17, 1984, approximately nine (9) months later,

did the hearing examiner file her report with Mayor Coleman Young. Thereafter, Mayor Young did not make his determination affirming petitioners discharge until November 18, 1985.

On July 25, 1986, petitioner caused the complaint in this matter to be filed in Wayne County Circuit Court. That complaint for writ of mandamus and action for damages alleged both violations of petitioners due process and equal protection rights under the United States Constitution, 42 U.S.C. 1983 and violations of the substantive and procedural requirements of Michigan Veterans Preference Act, M.C.L. 35.402.

On April 15, 1988, Judge Borman, Wayne County Circuit Court, heard cross-motions for summary judgement. The lower court ruled dispositively on the petitioners Loudermill claim i.e. his claim that his constitutional due process and equal protection rights were violated. She

declined to rule, however, on the remaining Veterans Preference Act violation allegations, indicating that she felt they were inappropriate to be brought within a mandamus action. Subsequently, these claims were refiled in connection with an action for Writ of Superintending Control, Case No. 88-811480-AS and, as a result, ruled on by the court. These Veterans Preference Act claims, while interrelated to the petitioners Loudermill claim were not resolved by the lower court in this action and, accordingly, are not an issue on appeal in this case.

It would appear, however, because of the interrelatedness of the issues and factual circumstances between this case and Wayne County Circuit Court No. 88-811480-AS, that these two actions should be consolidated for determination on appeal. Both counsel for petitioner and counsel for defendant concur that this would be

appropriate and most efficient way to resolve all the issues in this matter, and respectfully request that Wayne County Circuit Court act on petitioners Motion for Consolidation.

The Motion for Consolidation was scheduled for and heard by Wayne County Circuit Court on June 3, 1988. At oral argument on this motion, Judge Borman, for the first time, informed the counsel for the petitioner and defendants that she, on her own, on April 15, 1988 entered an order granting the defendants Motion for Summary Disposition, and therefore, that case was no longer before the court and no consolidation of actions was possible. The counsel for the petitioner explained to the court that neither party nor their counsel were aware that such an order had been entered by the court and that such entry on April 15, 1988 prejudiced the petitioner by removing his ability to appeal as a matter or right.

However, the Court responded that the matter should be taken up with the Michigan Court of Appeals.

ARGUMENT

THE CITY OF DETROIT FIRE DEPARTMENT DENIED PETITIONER HIS CONSTITUTIONAL DUE PROCESS AND EQUAL PROTECTION RIGHTS BY SUSPENDING AND THEN DISCHARGING HIM WITHOUT ADEQUATE NOTICE OF PRESUSPENSION OR PREDISCHARGE HEARINGS AS REQUIRED UNDER LOUDERMILL.

The sole issue in this appeal is controlled by the United States Supreme Court decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L. Ed.2d 494, 105 S. Ct. 1487 (1985). In that case Loudermill, an employee of the Cleveland School System and also classified as a civil service employee under the Ohio civil service statute, was discharged for falsifying his employment application. The statute provided that such an employee so classified could not be suspended or

terminated except for good cause shown, and may obtain administrative review of any such discharge. Pursuant to that provision, Loudermill filed an appeal with the Cleveland Civil Service Commission. Some nine (9) months after his discharge, the Commission heard argument and announced that it would uphold the dismissal. Loudermill then filed suit in the United States District Court for the Northern District of Ohio, alleging that the Ohio statute providing for administrative review was unconstitutional on its face, as it provided no opportunity for a discharged employee to respond to charges against him prior to removal, thus, depriving him of liberty and property without due process. He also alleged the statute was unconstitutional as applied because discharged employees were not given sufficiently prompt post-removal hearings. The district court dismissed this suit for failure to state a claim on which

relief could be granted.

On appeal, the United States Supreme Court held that the Ohio Civil Service statute plainly supported the conclusion that Loudermill possessed property rights in continued employment, and that the Due Process Clause provides that such property rights cannot be deprived except pursuant to constitutionally adequate procedures.

As to the procedures which would be found constitutionally adequate, the Supreme Court stated as follows:

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." . . . We have described the "root" requirement of the Due Process Clause as being "that an individual be given an opportunity for a hearing before (sic) he is deprived of any significant property interest." . . . This principle requires "some kind of a hearing" prior to the discharge of an employee who was a constitutionally protected property interest in his employment. Id. at 1493 (Emphasis Added).

The court went on to indicate that the pretermination hearing, though necessary, need not be elaborate:

> In general, "something less" that a full evidentiary hearing is sufficient prior to adverse administrative action . . . Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistake in decisions - essentially, determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action . . .
>
> The essential requirements of due process and all that respondents seek or the Court of Appeals required are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story. Id. at 1495 (Emphasis Added).

While subsequent appellate decisions have indicated that there is no need for a

neutral official for such a pretermination hearing, there is uniform recognition that, in order for such a pretermination hearing to be "meaningful", notice must be given to the employee, not only of the nature of the charges against him, but also that the City is proposing to take administrative or disciplinary action against him because of the alleged charges. Loudermill, supra.

In the petitioners case, it is uncontested that the Michigan Veterans Preference Act is the type of state legislation which confers on the petitioner a constitutionally protected property interest in his employment with the City of Detroit. See Casad v. City of Jackson, 79 Mich. App. 573 (1977). Accordingly, a pretermination hearing, pursuant to Loudermill, was required prior to any suspension or discharge.

With respect to the suspension, there is a conflict of testimony between Mr. Gorak

and the petitioner as to what occurred at the February 11, 1982 meeting in Mr. Gorak's office, and whether any notice of proposed disciplinary action preceded that meeting. Mr. Gorak's testimony at the Veterans Preference Act hearing was equivocal at best as to the type of notice which he gave to the petitioner. The petitioners testimony, on the other hand, is quite explicit. He testified that he was the one who initiated and requested the meeting with Mr. Gorak to resolve what he saw as a personnel problem. The petitioner went into that meeting with Mr. Gorak with the understanding that it was nothing more than an informal meeting to attempt to resolve certain personnel conflicts. He testified that he was never given any notice, prior to the meeting, that the Fire Department was considering taking disciplinary action against him (including a possible suspension because of charges brought against him by the complainant,

Delores Stewart, who was not in attendance at the meeting). He further testified that not until the end of that meeting (when it appeared that the other parties to the meeting had determined a manner to resolve the personnel problems) did Mr. Gorak, for the first time, advise the petitioner that he was going to be suspended.

Even more significantly, it was uncontested that absolutely no type of pretermination hearing was held prior to the petitioners discharge on February 19, 1982. At the hearing on the cross-motions for summary judgement, Judge Borman simply stated her view that she felt the meeting with Gorak was "adequate" under Loudermill, and granted the City's motion for summary disposition as to that claim.

Motions for summary disposition are to be granted only if the facts taken in a light most favorable to the non-moving party would still indicate that the owing party

was entitled to judgement as a matter of law. Karibian v. Paletta, 122 Mich. App. 353, 322 N.W.2d 484 (1983). In this case, the trial court clearly erred in granting summary disposition to the City of Detroit and not allowing this matter to go to resolution at trail on the issue of whether an adequate pretermination hearing had been provided prior to the petitioners suspension.

Moreover, the court clearly erred, as a matter of law, in ruling against the petitioner as to the denial of his pretermination hearing rights relative to his discharge. It was uncontested that no such predischarge hearing was held.

The petitioner submits that the adequacy of any pretermination hearing must necessarily be dependent to and interrelate with the state law property interest which is being protected. In this case, the petitioner's constitutionally protected

property interests are conferred both under the Civil Service Act of the State of Michigan and under the Michigan Veterans Preference Act. The petitioners rights under the Civil Service Act are analogous to those of Mr. Loudermill in the case cited. However, under the Veterans Preference Act, it is submitted that the petitioners property interest rights are clearly more expansive. In Loudermill, the Supreme Court implied a constitutional requirement for a pretermination hearing, notwithstanding the Ohio statute, which only provided for a post-termination hearing. In the case of the Michigan Veterans preference act, the first clause of Section 2 of that Act most clearly requires and sets forth that:

> No veteran . . . holding employment in any public department . . . of the state or any county, city or township or village of the State . . . shall be removed or suspended . . . except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of

> intoxication, conviction of felony or incompetency; and such veteran shall not be removed, transferred or suspended for any cause above enumerated . . . except after a full hearing . . . before the mayor of any city . . .
> (Emphasis Added).

In Loudermill's case, no such statutory language existed, yet the U.S. Supreme Court held that his constitutionally protected property interest in employment mandated a "pretermination hearing". Here, the Michigan Veterans Preference Act clearly requires a full hearing before termination.

The City of Detroit will undoubtedly cite this Court to an unpublished per curiam Court of Appeals opinion, Egan v. City of Detroit, Mich. App. No. 65010 (Slip Op., October 4, 1983) in which a panel of the Court of Appeals held that notwithstanding the clear language set forth in the Act, the VPA statute did not require a pretermination hearing.

(It should be pointed out that the same

panel in that opinion found no constitutional due process violation by the failure to provide any pretermination hearing - a view rejected by the U.S. Supreme Court in Loudermill two (2) years later).

With all due respect to that panel of the Court of Appeals, the petitioner submits that their non-precedential opinion in Egan, supra, cannot withstand close scrutiny. In that opinion, the court mouths its obligation "to give effect to the entire statute" (Id. at p. 3), yet it proceeds to construe the statute in a way that totally nullifies the entire first clause.

The Michigan Appellate Courts have, for many years, followed a cardinal rule of statutory construction that all parts of a statute must be interpreted to give them meaning and effect and it is a legal error to construe a statute in a way which makes nugatory one or more clauses by favoring

another. In re Harris Estate, 151 Mich. App. 780, 391 N.W.2d 487 (1986); Michigan Mutual Ins. Co. v. Allstate Ins. Co., 146 Mich. App. 475, 382 N.W.2d (1985); R& T Sheet Metal, Inc. v. Hospitality Motor Ins., Inc., 139 Mich. App. 249, 361 N.W.2d 985 (1984); Preston v. Sleziak, 383 Mich. 422, 175 N.W.2d 759 (1970).

Admittedly, the two provisions of the Act appear to be in conflict, yet, they were harmonized in a rational, judicially sound manner over 50 years ago by Attorney General Paul Voorhies. In 1932 OAG 584, the Attorney General set forth his interpretation of the Act which had recently been amended:

> Section 2 of the act (Section 901, Compiled Laws of 1921), as amended by Act No. 69, Public Acts of 1931, provides that no veteran or other solider as herein before indicated who holds any office or employment in a state department (except heads of departments and firs deputies of such heads) shall be removed or suspended except for "official misconduct, habitual, serious or

willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency"; and even for such reasons he shall not be removed, transferred or suspended except after a full hearing before the Governor. This section further provides that as a condition precedent to such removal, he shall be entitled to a notice stating the cause of removal, at least fifteen days prior to the hearing before the Governor. However, the effectiveness of the above provisions is considerably changed by another provision that where such veteran has been removed, transferred or suspended without a notice and hearing, he shall file a written protest with officer whose duty it is to make the removal, transfer or suspension within thirty (30) days from the day such veteran is removed, transferred or suspended. Otherwise, he shall be deemed to have waived the benefits and privileges of the Act.

Apparently, the later provisions read in connection with the other requirements suspension or transfer may be made by the department head without notice and hearing before the Governor and becomes effective so as to remove the veteran from the payroll, unless the veteran after such removal, transfer or suspension shall file a written protest with the head of the department within thirty days after the date of such removal, transfer or suspension becomes final. If

> the protest is filed, the veteran is entitled a notice of the causes for removal and a hearing before the Governor before the removal shall become effective. In other words, under the latter circumstances, the pay of the veteran continues and his removal, transfer or suspension is not final unless and until the notice has been given, the hearing held and the Governor confirms the same. Up to that point of time, the veteran continues to be entitled to receive his pay, assuming that he files the written protest, etc, within the thirty day period. (Emphasis supplied.)

Voorhie's opinion reconciles the two parts of the statutes in a meaningful and humane way. Ordinarily, he suggests, a full VPA hearing should be held before a veteran-employee is discharged or suspended. (Indeed, this is the procedure used by numerous cities and counties in Michigan and which, under the OAG opinion, must be used by Michigan state departments). However, he recognizes that there may be situations which warrant suspending or removing the veteran first. In that instance, (assuming

the veteran files a timely protest) the veteran is kept officially on the payroll-regardless of whether he works-until the VPA hearing is held and a decision made by the Mayor). His suspension or removal is not and does not become official until after the VPA proceeding.

This interpretation gives the city (or other public unit) the discretion whether to keep the veteran <u>at work</u> pending the Veteran's Preference Hearing, but not whether to keep him <u>employed</u>. It also impresses on the City the necessary urgency to speedily resolve the suspension or discharge.

Petitioner submits that the <u>Loudermill</u> violation of his property interest in employment is that much more clear, because the City of Detroit has <u>not</u> followed a proper interpretation of the Veterans Preference Act.

Moreover, the adequacy of any

Loudermill pretermination hearing is necessarily interrelated with the adequacy of the post-termination hearing. As the Supreme Court held in Loudermill:

> Our holding rests in part on the provisions in Ohio law for a full post-termination hearing. In his cross-petition, Loudermill asserts, as a separate constitutional violation, that his administrative proceeding took too long . . . The Due Process Clause requires provision of a hearing "at a meaningful time." E.g., Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 14 L. Ed.2d 62 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. Id. at 1495-1496. (Emphasis added).

In Loudermill's case, a nine month delay (two and one-half months before the hearing and six months more before a decision) was not found to be too long. In his concurring opinion, however, Justice Marshall disagreed:

> "Were there any guarantee that the post-deprivation hearing and ruling would occur promptly, such as within a few days of the termination of wages, then this

> minimal pre-deprivation process might suffice. But there is no such guarantee. On a practical level, if the employer had to pay the employee until the end of the proceeding, the employer obviously would have an incentive to resolve the issue expeditiously. The employer loses this incentive if the only suffering as a result of the delay is borne by the wage earner who eagerly awaits the decision on his livelihood, nor has this court grounded any guarantee of this kind in this constitution. Indeed this court has in the past approved or at least implicitly an average 10 or 11 months delay in the receipt of a decision on social security benefits and in the case of Loudermill, given approval to a process that took nine months. The hardship inevitably increases as the days go by, but nevertheless the court countenances such delay. The adequacy of the pre and post-deprivation procedures are inevitably intertwined, and only a constitutional guarantee that the latter will be immediate and complete might alleviate my concern about the possibility of a wrongful termination of wages." Id. at 1498.

However, the historical pattern of the City of Detroit in its recent veteran discharges is one of extremely long and clearly unconstitutional delays. By way of example:

1. Egan v. City of Detroit, supra. Egan was dismissed in May, 1976. His VPA hearing was held, off and on, between 1976 and 1978. The hearing officer made no report until late June, 1981. The Mayor did not render his decision until November, 1981. Total time; 5 1/2 years.

2. Sibert v. City of Detroit. (Court of Appeals No. 106370, Lower Ct. No. 87-722345-AS). Sibert was discharged March, 1977. The City refused to give him a VPA hearing and Sibert had to sue the City simply to obtain his VPA administrative proceeding right. A jury determined he had a right to a VPA hearing in February, 1984. The VPA hearing was not held until April, 1985. The hearing officer did not submit a report to the

Mayor until September, 1986 and the Mayor made his decision affirming the discharge November 15, 1986. Total time: 9 1/2 years. Time from jury decision; 2 1/2 years.

3. Adams v. City of Detroit (present case). Adams was suspended February 10, 1982. Discharged February 19, 1982. VPA hearing held August 25, 1983. Hearing officer's report filed April 17, 1984. Mayor Young's decision mailed November 18, 1985. Total time: 3 1/2 years.

4. Borden v. City of Detroit (Wayne County Circuit Court Case No. 88-804966-CL). Borden discharged November, 1987. VPA hearing held February, 1988. Transcript filed September, 1988. Hearing officer's report filed October 30, 1988. Mayor Young's decision, January 27,

1989. Total time: 14 months.

Mr. Borden's determination was only rendered as "quickly" as it was by legal intervention of Borden's counsel every step of the way.

The above chronologies, all part of the official records of these action, demonstrates that the City of Detroit's pattern and practice of "discharged now, VPA hearing later", violates both the spirit and letter of the constitutional admonition that such hearings be "at a meaningful time." These discharged veterans, often not even accorded unemployment benefits, have by the City of Detroit actions been deprived of their basic means of support for themselves and families, much less the ability to retain experienced legal counsel to litigate their right to return to employment illegally taken from them.

Moreover, the Veterans Preference Act as applied by the City of Detroit,

demonstrates a violation of petitioner Equal Protection rights, in that different units of government apply it in disparate manner. The state government and many other municipalities follow the Voorhie's interpretation of the Act, while the City of Detroit chooses to ignore the first provision entirely and discharge as it chooses, without retaining the Veteran on the payroll.

Finally, the practical effect of the City's interpretation and prior decision of Michigan Courts makes Petitioner's property right deprivation all the more evident. Clearly implicit in the Loudermill opinion is the belief that, if wrongfully discharged, an employee through his post-termination hearing, could be placed in the position he would have been. Yet, these lengthy, delayed post-termination proceedings deprive the wrongfully discharged veteran not only of his wages,

but of all the benefits attached to his public employment position. And, the Court of Appeals in In re Stuart Egan, 150 Mich. App. 14, 387 N.W.2d 861 (1986), has held that not all lost benefits may be restored at time of reinstatement. In Egan, supra, the Court of Appeals denied recovery of lost social security benefits, health insurance benefits and any other benefits which would not be subject to federal income tax. Whether such benefits are subject to tax, they are nevertheless valuable benefits to the employee of which he is being unconstitutionally deprived.

Under the Court of Appeals' decision in Egan, supra, the wrongfully suspended or discharged veteran can never be made whole. Accordingly, the post-termination hearing procedure, as applied, become constitutionally defective.

In the above context, the right to an adequate pretermination hearing becomes

essential. It was not provided to Petitioner by the clear, willful action of the City of Detroit.

The right to due process is conferred, not by legislative grace, but by constitutional guarantee. Loudermill clearly states that once a substantive property interest is conferred by state statute (V.P.A.), the state may not statutorily authorize a taking of that property interest without appropriate procedural safeguards, that is constitutional due process. The Michigan Veteran's Preference Act statute, therefore, extends the protection property interest of veteran to a right against suspension and termination, except after a full hearing, and must be so construed to be consistent with this constitutional guaranty.

FACTS

1. Petitioner suspended by Detroit Fire Department on February 10, 1982.

2. Petitioner discharged by Detroit Fire Department on February 19, 1982.
3. Petitioner Veteran's Preference Act protest letter to Mayor on March 4, 1982.
4. Petitioner Civil Service Hearing on June 24, 1982.
5. Civil Service Arbitrator's Decision rendered on August 6, 1982.
6. Veteran's Preference Act Hearing August 25 and September 13, 1982.
7. Veteran's preference Act Hearing examiner's report filed with Mayor on April 17, 1984. Examiner's failed or refused to provide a copy of the report to the Petitioner.
8. Mayor Coleman A. Young's letter affirming discharge November 18, 1985.
9. Petitioner Mandamus complaint filed July 25, 1986.
10. Circuit Court decision dismissing Mandamus action April 15, 1988.

11. Superintending control action filed May 10, 1988.
12. Motion to consolidate cases heard June 3, 1988.
13. Circuit Court decision dismissing superintending control action january 30, 1989.
14. Michigan Court of Appeals action on February 6, 1989.
15. Michigan Court of Appeals order affirming circuit court decision was issued on April 10, 1990.
16. Michigan Supreme Court action was filed on June 28, 1990.
17. Michigan Supreme Court order denied application for leave to appeal was issued February 25, 1991.

What type of pre-discharge hearing is required under Loudermill, supra?

This is a constitutional, due process requirement, separate and apart from the statutory VPA requirements. In Loudermill,

supra, the United States Supreme Court held that in circumstances such as the present, where there is a constitutionally protected statutory entitlement or property interest, an employee must be given a some pre-termination hearing. Justice Brennan, concurring in part, stated that the court did not specifically prescribe the precise form of required pre-termination procedure to be used. However, he felt it was clear that where there exists not just plausible arguments to be made in support of retention, but also "substantial disputes and testimonial evidence," due process may well require more than a simple opportunity to argue or deny. Id. at 1499. At a minimum, the Constitution requires pre-termination procedures which are sufficient to provide "an initial check against mistaken decision - essentially, a determination of whether there are reasonable grounds to believe that the

charges against the employee are true and support the proposed action." Id. Justice Brennan went on to state that when factual disputes are involved, an employee may deserve a fair opportunity before discharge to produce contrary records, or testimony or even to confront an accuser in front of the decision maker. While such an opportunity might not necessitate "elaborate" procedures, states Justice Brennan, "the fact remains that in some cases only such an opportunity to challenge the source or produce contrary evidence will suffice to support a finding that there are "reasonable grounds" to believe that accusations are true." Id.

Additionally, no Michigan Court has addressed the question whether a pre-termination hearing is adequate where the decision-maker does not address or define the hearing in terms of the specific and narrow grounds for suspension or discharge

set forth in the Veteran's Preference act. That is, a Civil Service type of hearing would encompass many grounds for suspension or discharge does not fully protect his constitutional due process interests funded on the Veteran's Preference Act.

This issue is, therefore, one of the first impression for the Michigan Appellate courts.

> What is the effect of a time violation by the City, i.e., failure to provide written notice required by the Act at least 15 days before the hearing or failure to provide a hearing within 30 days?

Plaintiff asserts that in this case, both VPA requirements were violated, a position rejected by the City. But, if proven to be correct, do such procedural violations entitle a plaintiff to reinstatement? Again, this particular question has not been addressed by the Court of Appeals.

When will a delay in the hearing procedure constitute a constitutional due process violation justifying relief?

Quite typically, there is a minimum of six (6) month delay between the discharge of a veteran by the City of Detroit and the final VPA determination by the Mayor. In certain cases, that delay has spanned eight years or more. (See Egan v. City of Detroit, 150 Mich. App. 14 (1986); Siebert v. City of Detroit, Mich. App. No. 106370 (on appeal)). In Adams' case, a period of three and a half years (February 19, 1982 to November 18, 1985) elapsed before a final decision. In Loudermill, supra, the United States Supreme Court declined to find a constitutional due process violation based on delay of a post-discharge hearing of nine (9) months. But, it did hold that "at some point, a delay in the post-determination hearing would become a constitutional violation." Id. at 1496. Plaintiff submits

that this "point" was reached and exceeded in this case; yet no appellate court has addressed this important issue.

REASONS FOR GRANTING WRIT

Petitioner urges that the decision of the Michigan Court of Appeals, is contrary to prior opinions of this court, and this court should grant certiorari to correct this contradiction. The City of Detroit Fire Department denied the petitioner his constitutional due process and Equal Protection Rights, by suspending him without adequate notice or presuspension or pre-discharge hearing as required under Loudermill.

The Michigan Court of Appeals answer was "no". The petitioner contends that the answer should be "yes".

The sole issue in the appeal is controlled by the United States Supreme Court decision in Cleveland Board of Education v. Loudermill. On appeal, the United States Supreme Court held that the Ohio Civil Service possessed property rights in continued employment, and that the due

process clause provides that such property rights can not be deprived, except pursuant to constitutionally adequate procedures.

The petitioner submits that the Loudermill violation of his property interest in employment is that much more clear, because the City of Detroit has not followed a proper interpretation of the Veteran's Preference Act - The adequacy of any Loudermill pre-termination hearing process adequately protects the constitutional procedural safeguards and property interest of the Petitioner.

There is uniform recognition that, in order for such a pre-termination hearing to be "meaningful", notice must be given to the employee, not only of the nature of the charges against him, but also that the City of Detroit is proposing to take administrative or disciplinary action against him, because of the alleged charges, Loudermill, supra.

Petitioner submits that the February 10, 1982, meeting with the Deputy Fire Commissioner, does not constitute a meaningful "hearing" under the Loudermill standard. Contrary to the conclusions reached by the Michigan Court of Appeals, the record clearly reflects that prior to February 10, 1982, the Petitioner was only apprised, after the meeting started, that the complaint had been filed against him at no time prior to that meeting, was the Petitioner advised that disciplinary action, such as suspension or discharge, were being considered. Such notice is essential under Loudermill for any hearing to be meaningful, and for the accused to seriously prepare a defense against such impending disciplinary action. Even more significantly, it is uncontested that absolutely no type of pre-termination hearing was held, prior to Petitioner's discharge on February 19, 1982.

Base due process demands that the

notice requirement includes the specific statutory ground on which the City of Detroit relies. Unless, the Petitioner is apprised of the specific ground or grounds for suspension or discharge, he can not effectively prepare to rebut the arguments and evidence which the City of Detroit will use to justify suspension or discharge. With respect to the discharge, the statutory ground is even more attenuated. The Petitioner was charged with being insubordinate by not accepting a suspension which was effected other than in accordance with the provisions of Loudermill. The City of Detroit has admitted, that it failed to provide written notice of any of the specific Veteran Preference Act grounds for suspension or discharge, set forth in the Veteran's Preference Act.

In the Petitioner's case, it is uncontested, that the Michigan Veteran Preference Act is the type of State

Legislation, which confers on the Petitioner a constitutionally protected property interest in his employment with the City of Detroit. See Casad v. City of Jackson, 79 Mich. App. 573 (1977). Accordingly a pre-termination hearing, pursuant to Loudermill, was required prior to any suspension or discharge. In the Loudermill's case, no such constitutionally protected property interest in employment mandated a "pre-termination" hearing. The Michigan Veteran's Preference Act clearly requires a full hearing before termination. A full Veteran's Preference Hearing should be held before a veteran employee is suspended or discharged. The veteran suspension or discharge is not and does not become official, until after the Veteran's Preference Act proceeding.

Moreover, the Veteran's Preference Act as applied by the City of Detroit, demonstrates a violation of the Petitioner's

Equal Protection Rights, in that different units of Government apply it in a disparate manner. The practical effect of the City of Detroit interpretation and prior decision of the Michigan Court of Appeals, makes Petitioner property right deprivation all more evident. The Michigan Court of Appeals in Stuart Egan, 150 Mich. App. 14, 387 N.W.2d (1980) held that not all lost benefits may be restored at time of reinstatement. Under the Michigan Court of Appeal's decision in Egan, supra, the wrongfully suspended or discharged veteran, can never be made whole. Accordingly, the post-termination hearing procedure, as applied becomes constitutionally defective. The right to adequate pre-termination hearing becomes essential. It was not provided to the Petitioner by clear willful action of the City of Detroit. The issue of pre-termination hearing, would be of little significance, if a post-termination hearing

was conducted and completed within the thirty (30) days of the protest as the Veteran Preference Act contemplates.

Petitioner, therefore respectfully submits, that the Michigan Court of Appeals, has misinterpreted Loudermill as applied to these circumstances, and in the context of these facts, there was no meaningful hearing, since notice of possible disciplinary action was never given, the trial court erred in finding no Loudermill violation where the Petitioner was suspended and discharged without any meaningful notice, opportunity to defend or hearing. The issues involved impact a significant group of Michigan residents, (i.e., most honorably discharged Veteran's who are employed by the state or local Government units. While the Veteran's Preference Act has its origin in Legislation from the mid-1800's, it has been constitutional and invoked by many Veterans employed by State,

County and Municipal Governmental units. It is of importance; particularly as a matter of Judicial integrity, that this act be interpreted and applied in a consistent manner by all Governmental units and in accordance with not simply the letter, but the spirit of this remedial act. For these reasons, this appeal is of significant impact to many citizens of the State of Michigan, including the Petitioner.

Petitioner has been stripped of his employment, because of one alleged remark to a co-worker and refusal to obey an illegal order. It is inconceivable that this conduct rises to the level of seriousness for which a Veteran should be discharged under the Veteran's Preference Act and his due process and equal protection rights violated.

CONCLUSION

The Veteran's Preference Act may be a "historical relic" as certain Judges have

described it. However, that is not the view of the legislature, which has never repealed it. Therefore, it is improper for the Michigan Judiciary to take it upon itself, by strained legislative construction to narrow and nullify its provisions and procedural and substantive protections for Veterans. These issues have reoccurred in dozens of instances in the lower courts for lack of a definitive interpretation of the Veteran's Preference Act.

Petitioner request that this court reverse the Michigan State Court of Appeals final order and judgement dated April 10, 1990. The order should be revised, adjudicating the City of Detroit clear liability under the due process and equal protection clause and 42 U.S.C. 1983.

In this case, where the petitioner was suspended and discharged without any meaningful notice, opportunity to defend or hearing and a three-half (3 1/2) years delay

between termination and a final hearing decision is inexcusable and petitioner submits, amounts to a constitutional due process deprivation, entitling the Petitioner to an order of reinstatement, Equal Job Opportunity, compensation of full back pay and pay increases with interest, benefits (including social security, allowances, health care insurance - medical and dental, sick and vacation time, unemployment, seniority cola payment, retirement and pension), attorney fees and costs.

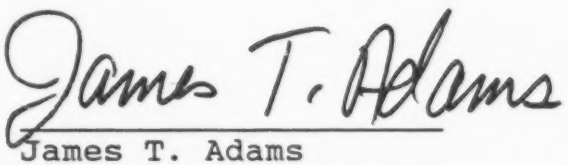
Petitioner submits that, if not for him, then for the thousands of other honorably discharged Veterans holding public office in the State of Michigan, that the intend and spirit of the Veteran's Preference Act, due process and Equal Protection Rights must be honored by this court.

Further that for all reasons set forth

above, petitioner urges that this court grant the petition and issue a writ of certiorari.

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,



James T. Adams
4534 W. Outer Drive
Detroit, Michigan 48235
1 - (313) 864-1790

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

APPENDIX A

THE CIRCUIT FOR THE COUNTY OF WAYNE
STATE OF MICHIGAN
Praecipe For Motion And
Order/Judgment

JAMES T. ADAMS
Plaintiff

Civil
Action No. 86-619629-CZ

Criminal No. _____

CITY OF DETROIT
Defendant

Please place Plaintiff's/Defendant's (strike one) Motion for (State Nature of Motion in brief form)
SUMMARY DISPOSITION

On the motion calendar for (date) Apr 15, 1988 This motion is to be heard by JUDGE HON. SUSAN D. BORMAN TO COURT CLERK: Have the following Order/ Judgment completed and signed by Judge and check 1 or 2 below, whichever is applicable.

ORDER/JUDGMENT

Dated: APRIL 15 19, 88

1. IT IS HEREBY ORDERED THAT the aforesaid motion be and the same hereby DENIED.
2. IT IS HEREBY ORDERED THAT the aforesaid motion be and the same is hereby GRANTED, AND IT IS FURTHER ORDERED AND ADJUDGED.

SUSAN D. BORMAN
Circuit Judge

APPROVED AS TO THE
FORM AND SUBSTANCE
BY COUNSEL FOR: _____

No.A 06615CERTIFIED COPY - "LAW"

State of Michigan,

ss

County of Wayne

I, JAMES R. KILLEEN, clerk of Wayne County, and Clerk of the Circuit Court for the County of Wayne, do hereby certify, that the above and the foregoing is a true and correct copy of 86 619629 CZ Praecipe for Motion and Order/ Judgment entered in the above entitled cause by said Court, as appears of record in my office. That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County, at Detroit, this day of June 24 A.D. 19 88

James R. Killeen, Clerk

Fee $ 25 _____ Deputy Clerk

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

APPENDIX B

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

IN RE:

JAMES T. ADAMS, Petitioner

Circuit Court No.: 88-811480 AS
HON. SUSAN D. BORMAN

_____/

JOHN A. STEVENS (P 26198)
Attorney for Petitioner
2555 Crooks Road Suite 200
Troy, MI 48098
(313) 643-7900

JOHN H. WILLEMS (P 31861)
Attorney for Respondents
1010 City-County Building
Detroit, MI 48226-3491
(313) 224-4550, Ext. 238

_____/

ORDER DENYING WRIT OF
SUPERINTENDING CONTROL

At a session of the Court,
held on Jan 30, 1989
at the City-County Building,
Detroit, Michigan

Present: HON. Susan D. Borman

Plaintiff having petitioned for a writ of superintending control and other relief, and upon the parties' cross-motions for summary disposition, the Court having considered the record and the briefs and

oral arguments of counsel

IT IS HEREBY ORDERED that Plaintiff's Petition for a Writ of Superintending Control is denied;

IT IS FURTHER ORDERED that Plaintiff's Motion For Summary Disposition is denied;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition is granted and the Complaint is dismissed in its entirety and with prejudice.

SUSAN D. BORMAN
Wayne County Circuit Judge

Approved as to form:

_____ By: _____
Counsel for Plaintiff

_____
Counsel for Defendants

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS

JAMES T. ADAMS,

Plaintiff-Appellant,

v. No. 110121

CITY OF DETROIT, DETROIT FIRE DEPARTMENT, AND MAYOR OF DETROIT,

Defendants-Appellees.

JAMES T. ADAMS,

Plaintiff-Appellant,

v. No. 115093

CITY OF DETROIT,

Defendant-Appellee.

Before: Danhof, C.J., and Brennan and G.S. Allen, Jr.,* JJ. PER CURIAM.

In Docket No. 110121, plaintiff appeals, by delayed application for leave granted, the trial court's order entered April 15, 1988, granting defendant's motion for summary disposition presumably under MCR 2.116(C)(8) and (10).

---

*Former Court of Appeals Judge, sitting on the Court of Appeals by assignment.

In Docket No. 115093, plaintiff appeals as of right the trial court's order entered on January 30, 1989 denying plaintiff's request for a writ of superintending control. The appeals were heard together. We affirm.

Plaintiff, an honorably discharged war veteran, was employed by the Detroit Fire Department as a Civil Defense Coordinator until his discharge on February 19, 1982.[1] On January 22, 1982, Delores Steward filed an employee complaint against plaintiff alleging that plaintiff had verbally abused and threatened her. Plaintiff responded to Stewart's complaint by submitting a written statement generally denying the allegations. Deputy Fire Commissioner Phillip F. Gorak, assigned to handle the complaint, found plaintiff's response inadequate and called a meeting for February 10, 1982. Gorak also asked plaintiff to submit another statement. Also submitted to Gorak was a statement from another employee, Alvin Martin, that on the

day before the Stewart incident, plaintiff had pulled a gun on Martin.

At the two hour meeting held February 10, Gorak reviewed plaintiff's second statement and the statements of Superintendents Bojalad and Dolley, both of whom were witnesses to the Stewart incident. Present were plaintiff, Gorak, Bojalad, and administrative assistant Quinton Watkins. Following review of the matter with Fire Commissioner Melvin D. Jefferson, Gorak found plaintiff guilty of conduct "bringing disgrace and discredit to the [Detroit Fire] Department" and suspended plaintiff for fifteen days. By letter dated February 10, 1982 and sent by registered mail to plaintiff's home and office, plaintiff was notified of his fifteen-day suspension.
On February 15, Gorak was informed that one of the two registered letters could not be delivered and the other was refused. Accordingly, Gorak decided to personally

take the suspension notice to plaintiff at plaintiff's office. When Gorak attempted to give the notice to plaintiff, plaintiff refused to accept it. Whereupon, Gorak walked down the hall to Superintendent Richard Dolley's office to ask Dolley to witness the attempted service. When Gorak and Dolley went to plaintiff's office, the door was closed and locked. Gorak knocked and got no response.

On February 16, plaintiff was advised by Watkins of his suspension and the requirement that he leave his office. On February 18, Gorak telephoned plaintiff and told him that if he did not vacate the premises "he was liable to discharge." Plaintiff replied that Gorak was not to contact him again and that all future communications should be through his attorney. Plaintiff did not name his attorney and hung up on Gorak.

Following this incident, Gorak

contacted Commissioner Jefferson. Together they decided to discharge plaintiff. Notice of discharge dated February 19, 1982 was prepared together with a letter explaining in detail the reasons for the discharge. The notice and attached letter was sent by registered letter, unsuccessfully. In addition, two telegrams were sent -- one to plaintiff's home and the other to his office. The telegrams were not accepted. On February 23, Administrative Assistant John King and two Detroit police officers were dispatched to contact plaintiff. King gave plaintiff notice and accompanying letter. Soon thereafter plaintiff cleaned out his office and left the premises.

On March 4, 1982, plaintiff filed a grievance with the Civil Service Commission and sent a letter to Mayor Young requested a Veteran's Preference Act (VPA) hearing pursuant to MCL 35.402; MSA 4.12222. Following a series of conferences and

meetings, the details of which are not necessary to spell out herein, a preconference hearing was held April 22, 1982. At that hearing, attended by plaintiff; his attorney, Kenneth Cockerel; the VPA hearings officer, Kay Schloff; city attorney, Kenneth King and Michael Jozwik, plaintiff requested that the VPA and civil service hearings be jointly held, but if that were not possible, then the transcripts of one hearing should be submitted in the other. Final decision on this matter was not reached but eventually plaintiff decided to have the civil service hearing held first.

The civil service hearing was conducted on June 24 and June 28, 1982 before mutually agreed upon arbitrator Stanley Brahms. Over six hundred pages of transcript were taken. On August 9, 1982, the arbitrator issued his written decision upholding plaintiff's discharge.

The VPA hearing was held in August and September, 1983. By agreement the transcripts of the civil service hearing were admitted instead of actual testimony. Plaintiff, however, did call two additional witnesses. Hearings Officer Schloff's findings upholding the discharge were presented to Mayor Young by letter on April 17, 1984. On November 18, 1985, Mayor Young upheld plaintiff's discharge by letter.

On July 25, 1986, plaintiff filed a complaint for writ of mandamus in the Wayne Circuit Court, alleging that plaintiff's due process and equal protection rights under 42 USC 193 had been violated and that the city had violated the provisions of the Veterans Preference Act, MCL 35.402; MSA 4.12222. At a hearing held April 15, 1988 on the parties' cross-motions for summary disposition, the court ruled on two issues. First, the court held that plaintiff was not denied due process or equal protection in

violation of Cleveland Bd of Ed v Loudermill, 470 US 532; 84 L Ed 2d 494; 105 S Ct 1487 (1985). Second, the court held that the provisions of the VPA were not violated and that a hearing examiner's findings of fact may not be challenged in a mandamus action, but only by appeal. Accordingly, the court granted summary disposition in favor of defendant and dismissed the complaint for mandamus.

While the action for mandamus was pending, on February 10, 1988, plaintiff filed a complaint for superintending control in the Wayne Circuit Court. The complaint alleged that Mayor Young's written decision was legally deficient, that plaintiff's due process rights under the VPA had been violated, and that the Mayor's decision was not supported by competent evidence. At a hearing held January 13, 1988 before the same judge who ruled on the mandamus proceedings, the court again granted

defendant's motion for summary disposition. In so ruling the court again rejected plaintiff's claim that his due process rights had been violated contrary to Loudermill, supra, and ruled against plaintiff on five additional claims of error.

In Docket No. 110121 plaintiff's application for delayed appeal in the mandamus action was granted November 16, 1988.[2] In Docket No. 115093 plaintiff appealed as of right the order denying the writ of superintending control. By order of this Court the appeals were heard together. Only the Loudermill issue is raised in Docket No. 110121. Five additional grounds for reversal are raised in Docket No. 115093.

I.

Plaintiff contends that the due process and equal protection rights granted by the United States Supreme Court in Loudermill,

supra, were violated by defendant City in five respects: (1) failure to notify plaintiff that administrative or disciplinary action would be taken against him because of charges brought against him by Ms. Stewart; (2) failure to afford plaintiff a pretermination hearing; (3) failure to hold a "full VPA hearing" before suspension or discharge; (4) inordinate and undue delay before and after conducting the VPA hearing; (5) failure to comply with 1932 OAG 584 issued by then-Attorney General Paul Voorheis.

The plaintiff in Loudermill was a classified civil service employee in the Cleveland school system who was discharge for falsifying his employment application. The Ohio statute provided that a classified employee could not be suspended or terminated except for good cause shown. Loudermill, 470 US at 535-536. When plaintiff's discharge was upheld by the

Cleveland Civil Service Commission, suit was filed in the United States District Court which dismissed for failure to state a claim. Loudermill, 470 US at 536-537. On appeal the United States Supreme Court held that plaintiff was entitled to "'some kind of a hearing' prior to discharge," Loudermill, 470 US at 542; that the required pretermination hearing is to determine whether "there are reasonable grounds to believe that the charges against the employee are true and support the proposed action" Loudermill, 470 US at 545-546; and that due process is satisfied if the plaintiff is given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the case." Loudermill, 470 US at 546. (Emphasis added.)

While Loudermill mandates that a plaintiff be notified of the charges brought

against him, nothing in the opinion imposes a further requirement that upon such notification the plaintiff be notified that disciplinary action might be taken against him. As a realistic matter, if plaintiff had any doubts that he might be disciplined because of the Stewart and Martin complaints, those doubts should have been dispelled when hearing officer Gorak informed plaintiff that his initial response was inadequate and asked plaintiff to submit another statement at the February 10, 1982 meeting. Given the facts in this case, we conclude that early on plaintiff knew full well that disciplinary action might ensue. Accordingly, we reject plaintiff's claim of Loudermill violation (1).

We disagree with plaintiff's claim that the city failed to afford him a pretermination as distinguished from a presuspension hearing. The record disclosed that Gorak gave plaintiff oral notice of the

charges which would be heard at the meeting on February 10, 1982; that in addition Gorak informed plaintiff of the evidence which had been submitted against plaintiff and that a hearing was held February 10 at which plaintiff, Gorak, superintendent Bojalad and Watkins were present. Thus, we conclude a predisciplinary hearing was held. As noted earlier, Loudermill does not require that the hearing be elaborate. Nor is it required to be held before a neutral party. See Garraghty v Jordan, 830 F2d 1295, 1302 (CA 4, 1987).

While it is true that following the February 10 hearing it was decided to suspend plaintiff and that in the period between the decision to suspend and the decision to discharge, plaintiff was not afforded an opportunity for another hearing, it was plaintiff who avoided all attempts to accept notice of suspension or to secure his vacation from office. Moreover, it was

plaintiff who on February 18, 1982 wa informed by telephone that if he did not vacate his office promptly "he was liable for discharge." Nothing in Loudermill requires a separate pretermination hearing. The city could have discharged plaintiff rather than suspend him following the February 10 meeting.

It is incongruous for this Court to conclude that plaintiff was denied his constitutional rights of due process and equal protection when the record so clearly discloses that plaintiff repeatedly refused to accept service of notice of suspension and declined to vacate his office after being pointedly warned he would be liable to discharge for refusing to cooperate with defendant administration. In short, we agree with defendants that any claimed deficiency in this matter was entirely due to Adams' own action. Plaintiff's claim that the constitutional rights granted him

under Loudermill were violated for reasons (3), (4) and (5), supra, are not rights conferred under Loudermill but instead are rights granted under the Veterans Preference Act and, as such, are more properly addressed infra in the five claims of error raised on Docket No. 115093.

II.

Plaintiff argues that the Veterans Preference Act requires that plaintiff be afforded a "full hearing" pursuant to the VPA requirements before termination. We strongly disagree.

The VPA was enacted in 1987 to give preference to Civil War veterans seeking and retaining public employment. Beadling v Governor of Michigan, 106 Mich App 530, 534-535; 308 NW2d 269 (1981). Following World War I the statute was strengthened to absolutely prohibit a veteran's removal from office, "except after a full hearing before the Governor of the state if a county

employee, or before the mayor of any city or village . . . if an employee of a city or village, or before the township board if a township employee." 1919 PA 224. But with the advent of civil service and collective bargaining and the protections afforded public employees thereunder, the statute was amended in 1931 (1931 PA 37) to add the additional proviso found in the statute today, that:

> [W]here such veteran has been removed, transferred, or suspended other than in accordance with the provisions of this act, he shall file a written protest with the officer whose duty under the provisions of this act it is to make the removal . . . within thirty days from the day such veteran is removed . . .; otherwise the veteran shall be deemed to have waived the benefits and privileges of this act . . . .

In an attempt to reconcile the apparent conflict between the 1919 language and the 1931 proviso, Attorney General Paul Voorheis issued 1932 OAG 584. That opinion construes the statute as amende in 1931 to mean that

while although a pretermination or presuspension hearing is the preferred procedural route, there are circumstances in which the public interest dictates the immediate removal of the veteran. In such instances, if the veteran does not file the thirty-day protest, the removal becomes final. However, if the veteran does file the timely protest and demand for hearing:

> the pay of the veteran continues and his removal, transfer or suspension is not final unless and until the notice has been given, the hearing held and the Governor confirms the same. Up to that point of time, the veteran continues to be entitled to receive his pay . . . . [1932 OAG 584.]

Plaintiff strongly argues that the Voorheis opinion makes sense because it gives the city (or other public unit) the latitude to keep the veteran at work pending the VPA hearing and at the same time impresses on the city the urgency of the need to hold the hearing, thus avoiding the unconscionable delay between termination and

the Mayor's decision in the instant case. Plaintiff further contends that the trial court misplaced its reliance on the following cases which hold contrary to Voorheis: Glover v City of Kalamazoo, 98 Mich App 465; 296 NW2d 280 (1980), lv den 411 Mich 951 (1981); Valentine v Redford Twp Supervisor, 371 Mich 138; 123 NW2d 227 (1963); or Egan v City of Detroit, unpublished opinion per curiam of the Court of Appeals, decided 10/4/83 (Docket No. 65010).

We agree with plaintiff that Glover did not deal with the issue presented in the instant case.[3] We further agree that Egan, while squarely addressing the issue, is an unpublished opinion which, under our rules, may not be cited as authority. But we agree that Valentine is contrary to 1932 OAG 584.

On February 24, 1961, Valentine was removed from the Redford Township police department on charges of immoral conduct.

Valentine, 371 Mich at 141. On February 28, he filed a demand for a hearing before the civil service commission, and a protest of his dismissal with the township board under the VPA. AT the public hearing before the civil service commission Valentine's dismissal was sustained. No hearing was ever held before the township board as required under the VPA. Because such hearing was not held, Valentine sought mandamus in circuit court to compel his reinstatement to his job. Following denial of mandamus by the circuit court, Valentine appealed to the Michigan Supreme Court. Valentine, 371 Mich at 142.

On appeal, the township contended that the VPA was inconsistent with and had been repealed by the subsequently enacted Civil Service Act. Valentine, supra. Seven Justices (Souris, J., dissenting) held that the VPA had not been repealed by the Civil Service Act and, therefore, plaintiff was

wrongfully denied a VPA hearing before the township board. Valentine, 371 Mich at 143-144, 146, 147. But having decided that, the court declined to reinstate plaintiff to his job.

> Plaintiff's petition for writ of mandamus and prayer for relief in his brief filed here seek mandamus to compel his reinstatement to his job. While the veterans' preference act does provide that the township board shall hold a hearing within 30 days after the veteran employee files a protest of his discharge, it does not provide that failing that the employee is automatically reinstated in his position. The hearing must precede such reinstatement. He has not had the hearing before the township board. He is entitled to it. His right to reinstatement is dependent on the decision of that board. [Valentine, 371 Mich at 147.]

Valentine's demand for reinstatement to his job with pay is precisely the relief promulgated in 1932 OAG 584. By refusing to reinstate plaintiff, the Valentine Court squarely rejected Voorheis.

III.

Plaintiff contends that the City of Detroit violated the VPA by failing to provide written notice of the enumerated VPA grounds for suspension or discharge. The specific VPA grounds for suspension or discharge are set forth in the act:

> No veteran . . . shall be removed or suspended. . . from . . . employment except for official misconduct, habitual, serious, or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of a felony, or incompetency . . . . [MCL 35.402; MSA 4.1222.]

Apparently, it is plaintiff's claim that because the city never used the "magic words" set forth in the statute, plaintiff was denied knowledge of the reasons for suspension or discharge. We find this position untenable.

At the February 10, 1982, meeting, the parties discussed the charges brought against plaintiff. Subsequently, plaintiff was sent letters which listed in detail the

reasons for the suspension. When plaintiff refused to accept the letters or vacate his office, new letters were sent to plaintiff setting forth in detail the reasons for discharge. Again, at the civil service hearing on his grievance, plaintiff was furnished a copy of the written decision of the commission. Under these circumstances to find that plaintiff did not adequately know in advance the charges against him would be disingenuous. In our opinion the grounds set forth in the letters and several communications given plaintiff clearly encompass the grounds set forth in the statute. Had notice been given plaintiff merely in terms of the six enumerated grounds in the VPA -- for example "official misconduct," plaintiff would have been less well-informed of the charges against him.

IV.

Under MCL 35.402; MSA 4.12222, plaintiff was entitled to a hearing before

the Mayor within thirty days of his March 4, 1982 letter of protest. The hearing was not conducted until some eighteen months later and Mayor Young's decision was not reached until three and one-half years after plaintiff's letter of protest. Plaintiff contends the delay was unconscionable and deprived plaintiff of his rights under the statute and the federal and state constitutions.

There would be merit in plaintiff's claim had not plaintiff himself requested that the civil service hearing be held first. As noted earlier in this opinion at the prehearing conference held April 22, 1982, counsel for plaintiff requested that the civil service hearing and the VPA hearing be held jointly, but if this were not possible, that the civil service hearing be held first and the transcripts of one hearing be used in the other. VPA Hearings Officer Schloff's findings of fact on April

17, 1984, recite that the delay in the VPA hearing resulted from plaintiff's choice "to first pursue the civil service remedies." We also note that although Mayor Young's decision was announced November 18, 1985, plaintiff made no complaint concerning delay until suit for mandamus was filed July 25, 1986. Given these circumstances we fail to find error because of delay.

V.

Plaintiff next argues that Hearings Officer Schloff's report failed to make adequate findings of fact to support any of the grounds set forth in the VPA, and because Mayor Young's decision was thus based on inadequate findings of fact, the Mayor's decision was not based on competent, material and substantial evidence. We disagree.

Pages 2 and 3 of Schloff's report set forth in detail the facts leading up to the decision to first suspend and thereafter to

discharge plaintiff and the reasons for the discharge. The report concludes as follows:

> Mr. Adams' conduct in the incident which caused the original suspension was serious and the employee felt threatened by the words used and by an unrelated incident involving a weapon.
>
> The Department had little choice but to discharge when Mr. Adams refused repeated attempts to serve him with the suspension and refused to vacate his office until the police were called in.
>
> I recommend that the Fire Department's actions be upheld.

While, as in Issue III supra, the findings do not cross-reference to or specify any of the six statutory bases for dismissal, we find the report sufficiently encompasses the grounds set forth in the statute. As this Court stated in Commeret v Board of Education of the Jenison Public Schools, 75 Mich App 115, 118-119; 254 NW2d 808 (1977):

> Here, the written notice to plaintiff conveyed an unmistakable message that her work was, in fact, unsatisfactory even though that

> exact word was not itself used. To require more, on these facts, would elevate form over substance; no magic word is necessary to give effect to the intention of the statute.

We further note that nothing in the VPA requires that the report specify in statutory terms which of the enumerated bases served as the actual basis for discharge.

VI.

Lastly, it is argued that the trial court erred in finding there was competent, material and substantial evidence on the record to support the discharge. Plaintiff's brief on this issue is mainly a repetition of the positions advanced in Issues III and IV, viz: that the Schloff report, the notice of suspension and later the notice of discharge failed to use the magic words or sufficiently describe conduct set forth as enumerated bases for discharge in the statute.

Plaintiff also contends that the hearing officer's report and the several notices furnished plaintiff describe no more than "insubordination" which is not an enumerated basis for discharge in the VPA but is an enumerated ground for discharge under § 12 of the Civil Service Act (CSA). MCL 51.362; MSA 5.1191(112). According to plaintiff it is clear legal error to attempt to stretch the VPA to encompass the grounds set forth for discharge in the CSA. We agree. However, as stated before, we find that the actions set forth in detail in the hearing officer's report and in greater detail in arbitrator Brahms' report to the City Civil Service Commission[4] describe more than simple insubordination.

Finding no error on any of the issues raised on appeal the trial court's order entered April 15, 1988 granting summary disposition to defendant and order entered January 30, 1988 denying superintending

control are affirmed. No costs, an issue of public importance being involved.

/s/ Robert J. Danhof
/s/ Thomas J. Brennan
/s/ Glenn S. Allen, Jr.

[1]A notice of discharge was prepared and dated February 19, 982. Plaintiff received the notice on February 12, 1982.

[2]It appears that after the mandamus action was dismissed, plaintiff prevailed on defense counsel to hold off submitting a final order in the mandamus action. Unbeknownst to either counsel an order was filed by the Court April 15. Upon learning of this, counsel for plaintiff "promptly" filed the application for delayed leave to appeal.

[3]The Glover Court focused on the due process issue as it related to the police officer's indefinite suspension prior to the officer's subsequent discharge.

[4]In his opening statement at the VPA hearing September 13, 1983, counsel for the city stated that the Fire Department intended to prove that plaintiff's actions constituted "official misconduct" under the VPA. (Tr, p 9, 9/13/93)

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

APPENDIX D

Michigan Supreme Court
Lansing, Michigan

Order
Entered: February 25, 1991

Michael E. Cavanaugh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

89447
89448

JAMES T. ADAMS,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

SC: 89447, 89448
COA: 110121, 115093
LC: 88-811480-AS,
86-619629-CZ

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

50219

I, CORBIN R. DAVIS, Clerk of the Michigan Surpeme Court, certify that the foregoing is true and complete copy of the order entered at the direction of Court.

_____, 1991 _____
Clerk

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

APPENDIX E

Court on the record, and what is not of record should be treated by the court as not existing. Sullivan v. Atwood (1939) 288 N.W. 300, 290 Mich. 664.

The council is the sole judge of qualifications of an applicant for office, and its decision cannot be reviewed by the courts. Op. Atty. Gen. 1928-30, p. 217.

35.402 **Same, removal, suspension or transfer from public employment, hearing, protest, waiver reinstatement**

Sec. 2. No veteran or other solider, sailor, marine, nurse or member of women's auxiliaries as indicated in the preceding section holding an office or employment in any public department or public works except heads of departments, members of commissions, and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency; and such veteran shall not be removed, transferred or suspended for any cause above enumerated from any office or employment, except after a full hearing before the governor of the state if a state employee, or before the prosecuting attorney if a county employee, or before the mayor of any

city or the president of any village, or before the commission of any such city or village operating under a commission form of government, if an employee of a city or village, or before the township board if a township employee, and at such hearing the veteran shall have the right to be present and be represented by counsel and defend himself against such charges; Provided further, that as a condition precedent to the removal, transfer, or suspension at least 15 days prior to the hearing above prior to the hearing above provided for, and such removal, suspension or transfer shall be made only upon written order of the governor, the prosecuting attorney, the mayor, commission, or the township board: Provided, however, That where such veteran has been removed, transferred, or suspended other than in accordance with the provisions of this act, he shall file a written protest with the officer whose duty under the provisions of this act it is to make the removal, transfer, or suspension, within 30 days from the day such veteran is removed, transferred, or suspended; otherwise the veteran shall be deemed to have waived the benefits and privileges of this act: Provided, however, Said hearing shall be held within 30 days of filing such notice: Provided further, That the mayor of any city or the president of any village or the commission of any such city or village operating under a commission form of government may refer any protest where a veteran is removed, transferred, suspended or discharged, to the legal department of such city or village for a hearing. The legal department shall act as a fact finding body and shall have the power to examine witnesses, administer oaths and do all those things which the mayor could do hereunder: Provided further, That the findings shall be

transmitted to the mayor in writing by the legal department, whereupon the mayor shall examine the transcript of the hearing and make a decision based on the transcript thereof: And provided further, That where such veteran has been reinstated to his employment upon the written order of the governor of the state if a state employee, the prosecuting attorney if a county employee, the mayor of any city or village operating under a commission form of government, or a township board if a township employee, or any an order of any court of competent jurisdiction, then such veteran shall be entitled to receive compensation for the time lost from date of such dismissal or suspension to the date of reinstatement at the same rate of pay received by him at the date of dismissal or suspension. As amended P.A.1955, No. 32, § 1, Imd. Eff. April 19, 1955.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

APPENDIX F

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c. Veterans: Under the State of Michigan's Veteran's Preference Act, veterans have the right to appeal suspensions or discharges directly to the Mayor by requesting a hearing within 30 days of the date the suspension or discharge is issued. Such hearings are usually delegated to designated hearing officers of the Law Department who prepare reports and make recommendations to the Mayor. Under the Act, Veterans may be suspended or discharged only for "official misconduct, habitual, serious, or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of a felony, or incompetency." (Section 35.402, P.A. 205, 1897, p. 261.)

Care should be taken by the employing department to word the discharge or suspension of a veteran in this manner to aid in winning an appeal under the Veteran's Preference Act.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

APPENDIX G

35.402 VETERANS - ARMED FORCES

NOTE 2

AN ORDER REMOVING, SUSPENDING OR TRANSFERRING A VETERAN WITHOUT NOTICE AND WITHOUT HEARING BEFORE THE GOVERNOR BECOMES EFFECTIVE UNLESS VETERAN MAKES A WRITTEN PROTEST WITHIN THIRTY DAYS AFTER DATE OF REMOVAL, TRANSFER OR SUSPENSION, AND IF THE VETERAN SO REMOVED, SUSPENDED OR TRANSFERRED DOES PROTEST, HE REMAINS ON THAT PAYROLL UNTIL NOTICE HAS BEEN GIVEN, THE HEARING HELD AT THE GOVERNOR CONFORMS THE REMOVAL, SUSPENSION OR TRANSFER. OP. ATTY. GEN. 1930 - 32, P. 584.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

APPENDIX H

CITY OF DETROIT

Executive Office

April 30, 1940
Executive Order #5

TO ALL DEPARTMENT HEADS, BOARDS AND COMMISSIONS:

In the future it will be necessary for you to send immediate written notice to the Mayor, the Civil Service Commission and to the Corporation Counsel in case of the removal from employment of any veteran employed by your particular department, and to include with this notice a statement of the reasons for such removal. When practical, this notice should precede the time for the taking effect of such removal.

Mayor

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

APPENDIX I

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

JAMES T. ADAMS
Plaintiff,
vs.
CITY OF DETROIT
Defendants.
_____/

Case NO. 86619629CZ
HON. SUSAN D. BORMAN

LANCE E. MERMELL (P17636)
Attorney for Plaintiff
17250 W. 12 Mile Rd.
Suite 103
Southfield, MI 48076
(313) 559-2530

JOHN H. WILLEMS (P31861)
Attorney for Defendants
1010 City County Building
Detroit, MI 48226-3491
(313) 224-4550, Ext. 238
_____/

AFFIDAVIT OF JAMES T. ADAMS

JAMES T. ADAMS, being duly sworn, states:

1. I am the Plaintiff in the above entitled cause of action.

2. This affidavit is based upon personal knowledge and I am competent to testify to the matters herein.

3. In response to the Affidavit of Michael Jozwik I can competently testify

that I never have waived my right to have a veterans preference hearing and I have never waived the statutory (30) thirty day time period in which the veterans preference hearing is to be held.

4. I was present at a Civil Service conference held on April 22, 2982 and did not request that the Civil Service and Veterans' Preference hearing be heard jointly or combined. The statutory period for holding my veterans preference hearing had elapsed well before April 22, 1982, and the City of Detroit violated my right to have a hearing within the statutory time required.

5. I filed a timely request for a Veteran's Preference Hearing.

6. The City of Detroit did not provide me with a Veteran's Preference Hearing within thirty days of receiving a timely request for the Veteran's Preference Hearing.

7. The City of Detroit set a hearing date for the Veteran's Preference Hearing for August 25, 1983.

8. Any suggestion or request for using transcripts from the Civil Service hearing at the Veteran's Preference hearing was made by the City attorney for the City of Detroit. (See page 3 from transcript of Veteran's Preference hearing dated September 13, 1983).

9. The City of Detroit never sent me a copy of the hearing officer's report and decision from the Veteran's Preference Hearing.

_____
JAMES T. ADAMS

Subscribed and Sworn to before me
this 18th day of February , 1988.

_____
Notary Public

County of (Wayne)

State of Michigan

My Commission Expires: 11-26-99

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES T. ADAMS

Petitioner,

vs.

CITY OF DETROIT, MICHIGAN

Respondent.

APPENDIX J

FILING AND MAILING CERTIFICATE

I, James T. Adams, hereby certify that on this 24 day of May, 1991, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing petition for Writ of Certiorari and further certify that I personally served on May 22 and July 30 and September 30, 1991 the required copies to the opposing counsel listed below:

City of Detroit, Michigan
City of Detroit Law Department
1010 City-County Building
Detroit, Michigan 48226

James T. Adams
4534 W. Outer Drive
Detroit, Michigan 48235
(313) 864-1790

SUPREME COURT OF THE UNITED STATES

JAMES T. ADAMS	Supreme Court Case No.
Petitioner,	State of Michigan Court of Appeals
	No. 110121 and 115093
vs.	
City of Detroit, Detroit Fire Department, Mayor of Detroit	State of Michigan Lower Court
	No. 88-811480-AS
	86-619629-CZ

PROOF OF SERVICE

JAMES T. ADAMS says that on May 22, 1991, July 30, and September 30, 1991, he served three copies of Petitioner's motion for writ of certiorari, affidavit in support of motion for writ of certiorari and a proof of service by enclosing said copies to party named and personally delivering to:

City of Detroit, Michigan
City of Detroit Law Department
1010 City-County Building
Detroit, Michigan 48226

James T. Adams

91-565

No. _____

FILED
OCT 23 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

JAMES T. ADAMS,
Petitioner,

v.

CITY OF DETROIT, MICHIGAN,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

TERRI L. HAYLES (P-33276)
Supervising Assistant Corporation Counsel
Counsel of Record
1010 City-County Building
Detroit, Michigan 48226
(313) 224-4550, Ext. 233

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN HOLDING THAT THE VETERANS PREFERENCE ACT DOES NOT REQUIRE THE PETITIONER RECEIVE A FULL HEARING PRIOR TO DISCIPLINARY ACTION.

II.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE PREDISCIPLINARY PROCEEDINGS AT WHICH IT WAS DECIDED TO SUSPEND THE PETITIONER FULLY COMPORTED WITH THE REQUIREMENTS OF THIS COURT'S DECISION IN *CLEVELAND BOARD OF EDUCATION v LOUDERMILL*.

PARTIES

Petitioner James T. Adams was the Plaintiff-Appellant in the courts below. Respondents City of Detroit, Coleman A. Young, Mayor of the City of Detroit, City of Detroit Fire Department, Melvin Jefferson, Fire Commissioner, and Phillip F. Gorak, Deput, Fire Commissioner were the Defendants-Appellees in the courts below.

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No. _____

In The

Supreme Court of the United States

October Term, 1991

JAMES T. ADAMS,

Petitioner,

v.

CITY OF DETROIT, MICHIGAN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

OPINIONS BELOW

On April 15, 1988, Judge Susan D. Borman, Wayne County Circuit Court, entered an order granting Defendant's Motion for Summary Disposition in a Mandamus Action brought by Petitioner.

On January 30, 1989, Judge Susan D. Borman, Wayne County Circuit Court, entered an order denying Writ of Superintending Control.

On April 10, 1990, Judges Robert J. Danhof, Thomas J. Brennan and Glenn S. Allen, Jr., State of Michigan Court of Appeals, issued an opinion affirming the above two actions.

On February 25, 1991, the Michigan Supreme Court denied the Petitioner's Application for Leave to Appeal.

JURISDICTION

The judgment of the State of Michigan Court of Appeals was entered on April 10, 1990. A timely petition

for leave to appeal to the Michigan Supreme Court was denied February 25, 1991. The Petitioner's request with this Court was filed within 90 days of that date. Respondent files the present brief in opposition within 30 days after receipt of petition. The jurisdiction of the Supreme Court has been invoked pursuant to Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution states as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Veteran's Preference for Public Employment 35.402 states, in pertinent part, as follows:

> No veteran . . . holding an office or employment in any public departmental . . . shall be removed or suspended . . . except after a full hearing before . . . the mayor of any city . . . [p]rovided, however, that where such veteran has been removed . . . other than in accordance with the provisions of this act, he shall file a written protest . . . within 30 days from the day such veteran is removed . . . otherwise the veteran shall be deemed to have waived the benefits and privileges of this act . . .

28 U.S.C. § 1257 State courts; certiorari:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

42 U.S.C. § 1983 Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

COUNTER-STATEMENT OF THE CASE

Petitioner Adams was employed under the jurisdiction of the Detroit Fire Department as Civil Defense Coordinator

until his discharge effective February 19, 1982. On January 22, 1982, an employee of the Fire Department filed a Complaint of threats and verbal abuse against Petitioner Adams. A meeting to discuss the matter was called by the Deputy Fire Commissioner, Phil Gorak, on February 10, 1982. After this meeting and further investigation and review by Mr. Gorak, he suspended Mr. Adams for 15 days. All attempts to serve Mr. Adams with notice of the suspension either by registered mail or personally were to no avail since Mr. Adams refused to accept it.

Several days later on February 18, 1982, Mr. Gorak spoke with Mr. Adams and informed him if he failed to vacate his office, he was liable for discharge. Mr. Adams still did not comply. The Department then decided to discharge Mr. Adams. Again, attempts to serve Mr. Adams by registered mail and telegrams failed because Mr. Adams refused to accept.

Finally, on February 23, 1982, an Administrative Assistant along with two police officers personally served the notice and explanatory letter on Mr. Adams. On March 4, 1982, Mr. Adams filed a request for a VPA hearing, received by the Mayor's office on March 5. At the same time, Mr. Adams filed a Civil Service grievance with the City's Personnel Department. A third step meeting regarding the grievance was scheduled for March 15, 1982. On that date, the Fire Department and the Personnel Department were contacted by telephone by attorney Kenneth V. Cockrel, who indicated that he would be representing Mr. Adams and requested re-scheduling of the third step hearing.

The third step hearing was held on March 24, 1982. Present were Mr. Adams, his attorney Mr. Cockrel, Fire Marshal Donald Robinson, Fire Department Administrative Assistant Quinton Watkins, City of Detroit attorney Kenneth King, and representing the Personnel Department,

Michael Jozwik. Mr. Cockrel and Mr. Adams contended that the bases for the suspension and discharge were legally insufficient and factually inexplicit. They were advised that the discharge was for insubordination and provided with records pertaining to the events leading to the discharge. It was also indicated that a full explication of the grounds for the disciplinary actions would be provided to Mr. Adams following the meeting.

A third step response was mailed to Mr. Adams and Mr. Cockrel on April 1, 1982 by Fire Commissioner Melvin Jefferson, Mr. Adams' ultimate superior, detailing in a five-page account the particulars supporting the Department's decision to suspend and discharge Mr. Adams.

In response, attorney Cockrel requested a full civil service hearing on Mr. Adams' grievance by way of letter dated April 2, 1982. In his letter, Mr. Cockrel also requested information regarding Mr. Adams' application for a VPA hearing. Michael Jozwik responded by letter dated April 15, 1982, scheduling a pre-hearing conference for April 22, 1982 and referring the VPA question to the City's attorney, Kenneth King.

In attendance at the pre-hearing conference were Mr. Cockrel, Mr. Adams, Mr. Jozwik, Mr. King and Kay Schloff, who had been designated to act as hearing officer in Mr. Adams' VPA hearing. Mr. Cockrel, on behalf of Mr. Adams, requested that the Civil Service hearing and the VPA hearing be either combined, or taken in serial order, with the transcripts from whichever hearing came first to be used in lieu of repeating all testimony at the hearing to be scheduled second. Although no final decision was made on this request at the pre-hearing conference, Mr. Cockrel's suggestion was ultimately taken up by the City. At Mr. Adams' request, the Civil Service hearing was held first.

The Civil Service hearings were held before mutually-selected arbitrator Stanley H. Brahms on June 24 and 28, 1982, which were reduced to some 600 pages of transcript encompassing the testimony of some ten witnesses and numerous exhibits. The City's case was consistent with the specification set forth in its step three answer. Arbitrator Brahms rendered his opinion upholding the discharge on August 6, 1982.

The VPA hearings were held before hearings officer Kay Schloff on August 25 and September 13, 1983. By agreement of the parties, the transcripts of the prior Civil Service hearings were entered in lieu of actual testimony, although Mr. Cockrel did call and interrogate two witnesses who had testified at the Civil Service hearings. Hearing Officer Schloff transmitted her findings to the Mayor's office on April 17, 1984. The Mayor sustained the discharge and informed Mr. Adams by way of letter dated November 8, 1985.

CURRENT STATUS OF CASE

On July 25, 1986, Petitioner Adams filed a Complaint for writ of mandamus in the Wayne Circuit Court alleging violation of his due process and equal protection rights under 42 U.S.C. § 1983. In addition, Petitioner claimed that the City had violated the provision of the Veteran's Preference Act; MCL 35.402; MSA 4.1222.

The trial court granted Petitioner's motion for summary disposition and dismissed the Complaint for mandamus. Petitioner appealed by delayed application for leave to the Court of Appeals, Docket No. 110121.

On February 10, 1988, Appellant filed a Complaint for Superintending Control in the Wayne County Circuit Court. On January 13, 1988, the Court granted Defendant-

Appellee's motion for summary disposition. Petitioner appealed by right to the Court of Appeals, Docket No. 115093.

The two were consolidated by order of the Court of Appeals. The matters were fully briefed and argued. The Court of Appeals issued a decision on April 10, 1990, *James T. Adams* v *City of Detroit, Detroit Fire Department, and Mayor of Detroit*, 184 Mich. App. 589, 458 N.W.2d 903 (1990).

In its decision, the Court of Appeals affirmed both of the lower court's decisions granting summary disposition to Respondent. Re-hearing was denied on June 8, 1990.

On February 25, 1991, the Michigan Supreme Court denied Petitioner's application for leave to appeal. Petitioner now requests this Honorable Court grant Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The trial court correctly ruled that the Petitioner has no right under the VPA to a predisciplinary hearing. The VPA provides that where a hearing is not held prior to imposition of discipline, the employee may request a hearing within thirty days of the date of the employer's action. Since there is no statutory right to a predisciplinary hearing, there can be no constitutional right to such a hearing.

The trial court correctly determined that the procedures under which the Petitioner was suspended and ultimately discharged fully comported with the requirements of the Due Process clause. The Petitioner was informed of the charges against him and given the opportunity to respond before discipline was imposed. Any insufficiency in the notice given to the Petitioner was caused by his refusal to

accept it. Therefore, there is no error in the proceedings below and the Petitioner's request for a Writ of Certiorari should be denied.

ARGUMENT

I.

THE PETITIONER HAS NO STATUTORY RIGHT TO A PREDISCIPLINARY HEARING. THEREFORE, THERE CAN BE NO CONSTITUTIONAL RIGHT TO SUCH A HEARING.

The Petitioner contends that the Michigan Veteran's Preference Act (VPA) entitles him to a hearing prior to suspension or discharge. The VPA as amended in 1931 (1931 PA 67) provides for either a hearing prior to discipline, or a hearing after the imposition of discipline. Where an employee does not receive a hearing prior to discipline, the VPA provides that he shall:

> file a written protest with the offices whose duty under the provisions of this act it is to make the removal . . . within 30 days from the day such veteran is removed . . . otherwise the veteran shall be deemed to have waived the benefits and privileges of this act.

§ 35.402 Mich. Comp. Laws Ann. (West, 1984).

The VPA clearly contemplates that an employer may impose discipline prior to a hearing. In addition, the act specifically enumerates a procedure by which the employee may request a hearing after discipline has been imposed. It therefore follows that the VPA does not grant the Petitioner an absolute right to a prediciplinary hearing.

This Court has determined that a property interest in employment is not created by the Constitution. *Board of Regents* v *Roth*, 408 U.S. 564, 577 (1972). Whether such an

interest has been created by a state statute must be determined by reference to state law. *Bishop* v *Wood*, 426 U.S. 341, 344 (1976). Where a property interest in employment is granted by a legislature subject to procedural limitations, the employee cannot assert a right broader than the grant as limited. *Arnett* v *Kennedy*, 416 U.S. 134, 153-54 (1973).

The Petitioner's assertion that the VPA grants an absolute right to a prediciplinary hearing rests entirely on a sixty-year-old Attorney General Opinion. The Court below correctly determined that the Michigan Supreme Court rejected that opinion in *Valentine* v *McDonald*, 371 Mich. 138, 147; 123 N.W.2d 227, 231 (1963).

In *Valentine*, the plaintiff was removed from his position for immoral conduct. The Civil Service Commission upheld the discharge. However, a hearing before the Township Board was never held as requested by the plaintiff and required by the VPA. The plaintiff requested that the Township Board reinstate him on the ground that the VPA hearing had not been held within thirty days of his request. The Board denied the request and the Circuit Court dismissed his complaint. On appeal in the Michigan Supreme Court, the court rejected the defendant's claim that the Civil Service Statute repealed the VPA. The court also rejected the plaintiff's claim that he was entitled to reinstatement until a VPA hearing was held. The court held that:

> While the Veteran's Preference Act does provide that the Township Board shall hold a hearing within thirty days after the veteran employee files a protest of his discharge, it does not provide that failing that the employee is automatically reinstated to this position. The hearing must precede such reinstatement. He has not had the hearing before the Township Board. He is entitled to it. His right

> to reinstatement is dependent on the decision of that Board.

Id. at 147, 231.

In *Glover* v *Kalamazoo*, 98 Mich. App. 465, 296 N.W.2d 280 (1980), plaintiff, a police officer, was suspended indefinitely pending criminal charges. The charges were later dropped on a technicality. The Chief of Police later terminated the officer for official misconduct for giving false testimony. At a hearing held pursuant to the VPA, the Mayor upheld the discharge. Plaintiff appealed to circuit court which held that the plaintiff was wrongfully discharged because he was not given a VPA hearing prior to his original suspension during his pending criminal case.

On appeal, the defendant asserted that the plaintiff waived his right to the hearing by not filing a protest within the thirty-day limit. The court held that the protest was filed within the limit. In addition, the court held that the trial court erred:

> [W]hen it found a violation of the hearing requirement of the veterans preference act. Plaintiff could have, but need not have, demanded a preference hearing at any time during the criminal prosecution. In the absence of such a demand, defendant had no affirmative duty to hold a hearing on the suspension.
>
> We also hold that plaintiff was not deprived of procedural due process as a result of his suspension. It is clear that defendant had an opportunity to be heard on the suspension. Plaintiff could have demanded an earlier hearing if he so desired.

Id. at 469, 296 N.W.2d at 282.

The Petitioner would have this Court confer a broader right than that granted him under Michigan law. It is clear

that the VPA does not grant an absolute right to a predisciplinary hearing. *Valentine* and *Glover*, *supra*, clearly demonstrate that there is no right to remain employed during the pendency of the VPA hearing; it follows that there can be no right to a VPA hearing before the imposition of discipline. Since the Petitioner has no statutory right to a predisciplinary hearing, he cannot have a constitutional right to such a hearing. Therefore, a Writ of Certiorari should not be granted.

II.

THE TRIAL COURT CORRECTLY HELD THAT THE DISCIPLINARY PROCEDURES UNDER WHICH PETITIONER WAS SUSPENDED AND ULTIMATELY DISCHARGED, FULLY COMPORTED WITH THE REQUIREMENTS OF *CLEVELAND BOARD OF EDUCATION* v *LOUDERMILL*.

The Petitioner asserts that his constitutional due process and equal protection rights have been violated because he received insufficient notice that the Respondent was about to take disciplinary action against him. In addition, he contends that since notice was not adequate, he was unable to prepare a defense. The Petitioner's argument rests on a misinterpretation of this Court's decision in *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532 (1985). The Petitioner contends that he was entitled to a hearing at which he would have the opportunity to present an elaborate defense.

In *Loudermill*, *supra*, this Court held that the Due Process Clause requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Id.* at 503-04, quoting *Boddie* v *Connecticut*, 401 U.S. 371, 379, 28 L.Ed. 2d 113, 91 S. Ct. 780 (1971). The predisciplinary hearing is "[i]n general, 'something less' than a full evidentiary hearing . . ." *Id.* at 506. It should be "an initial check against mistaken decisions —

essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. *Id.* at 469, 70. The process that is due to an employee under *Loudermill* is "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546.

In *Garraghty* v *Jorden*, 830 F2d 1295 (4th Cir. 1987), appellee was summoned to a meeting with his superiors. At this meeting appellee was charged with insubordination and requested to explain his conduct. Finding the appellee's explanation insufficient, his superiors suspended him. Appellee claimed that this meeting violated his Due Process rights because he was not informed before or at the beginning of the meeting that charges would be brought against him. The court applied *Loudermill*, determining that under the circumstances, the summons alone provided sufficient notice of the nature of the meeting. *Id.* at 1301. In addition, the court concluded that the discussion of the charge of insubordination and the opportunity provided to appellee to explain himself was sufficient under *Loudermill*. *Id.*.

In *Duchesne* v *Williams*, 849 F2d 1004 (6th Cir. 1981), plaintiff was discharged for improper conduct. A hearing was held at which the plaintiff was permitted to present witnesses. The discharge was upheld. The plaintiff later claimed that the hearing was not impartial and therefore did not satisfy the requirements of the Due Process Clause. The District Court granted plaintiff's request for an injunction "requiring as a matter of federal due process a trial-type predetermination evidentiary hearing before a neutral decisionmaker." *Id.* at 1006.

On appeal, the 6th Circuit reversed. The court held that *Loudermill* only required notice of the charges against the employee and an opportunity to present his side of the

story. *Id.* at 1007. The court determined that the purpose of the pretermination hearing is to:

> "invoke the employer's discretion," his sense of fairness and mutual respect, his willingness to reconsider. It is not designed or well-adapted to uncover the employer's bias or corrupt motivation.

Id. at 1008.

It is the full post-termination hearing that serves this purpose. The pretermination hearing is not meant to resolve the entire dispute, its purpose is to prevent mistakes by encouraging discussion prior to taking disciplinary action.

The record will clearly show that the Petitioner received sufficient notice of the charges against him and an opportunity to respond at the meeting held on February 10, 1982. It is not necessary for the employee to prepare an elaborate defense for such a meeting. The Petitioner was made fully aware of the charges against him and was permitted to respond orally and in writing. This is precisely the procedure required under *Loudermill*. *Garraghty v Jorden*, 830 F2d 1295, 1301 (4th Cir. 1987).

The Petitioner argues that he did not receive sufficient notice of his termination and that the City was required to hold a separate hearing on the issue of termination. The record shows that the Petitioner refused to accept service of notice that he was required to vacate his office. The record shows that the Petitioner was informed orally that he faced discharge if he refused to comply. Any insufficiency of notice is the result of the Petitioner's own actions. The Petitioner is not entitled to a separate pretermination hearing. The Court of Appeals correctly observed that the City could have discharged the Petitioner following the meeting of February 10.

The Petitioner received all the process that was due. He received a prediscipliniary hearing and a hearing after he

was terminated. Any delay in the convening of the VPA is the result of the Petitioner's own request that it be held after the Civil Service Commission hearing. The Petitioner's rights under the Due Process clause have been sufficiently protected under the employer's disciplinary proceedings. Therefore, the Petitioner's request for aWrit of Certiorari should be denied.

CONCLUSION

In light of the facts, arguments and authorities submitted above, as well as the detailed opinion by the Court of Appeals, Respondent requests that this Court deny Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

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